PP (SARAWAK FORESTRY CORPORATION) v. KAMIL SUTEH

HIGH COURT SABAH AND SARAWAK, KUCHING
FARIDZ GOHIM ABDULLAH JC
[CRIMINAL APPEAL NO: KCH-42H-7-5-2024]
27 JUNE 2025

Abstract – *(i) When a statutory provision provides for a penalty using the word 'and', ie, imprisonment 'and' a fine, this conjunction does not mandate that both penalties must be imposed. The court retains the discretion to impose either one, provided that the imposed penalty is within the statutory maximum limit; (ii) Non-binding sentencing guidelines and calculators are merely assistive tools, and their non-application does not invalidate a sentence, as they do not fetter the court's discretion to determine an appropriate sentence.*

CRIMINAL PROCEDURE: *Appeal – Sentence – Appeal by prosecution – Adequacy of sentence imposed by Sessions Court – Accused charged for offence under s. 37(1) of Wild Life Protection Ordinance, 1998 (Chapter 26) – Possession of 531 marine turtle eggs without valid written permission from Controller of Wild Life – Accused found guilty, convicted for offence and sentenced to fine of RM6,372 in default six months' imprisonment – Whether sentence adequate – Whether Sessions Court Judge ought to apply Sarawak's Wildlife Crime Sentencing Guideline and Wildlife Crime Sentencing Calculator for purpose of sentencing accused*

A team of enforcement officers from the Sarawak Forestry Corporation had conducted a raid on the respondent's ('accused') house, upon suspicion that the premises were selling marine turtle eggs ('eggs'). A total of 531 eggs were found in the accused's possession and he failed to produce a valid written permission from the Controller of Wild Life for such possession. The examination of the 531 eggs by the Biodiversity Conservation and Research Division of the Sarawak Forestry Corporation confirmed that the eggs were marine turtle eggs of the *Cheloniidae* species, which were listed as totally protected animal in Part I of the First Schedule to the Wild Life Protection Ordinance, 1998 (Chapter 26) ('Ordinance'). The accused was subsequently charged at the Sessions Court for an offence under s. 37(1) of the Ordinance. At the conclusion of the trial, the accused was sentenced to a fine of RM6,372 (equivalent to RM12 per egg), in default six months' imprisonment. Hence, the present appeal by the appellant ('prosecution'), challenging the adequacy of the sentence imposed by the Sessions Court Judge ('SCJ'). In support of the appeal, the prosecution argued that, *inter alia*,

the SCJ did not view the whole evidence objectively and opted not to apply the Sarawak's Wildlife Crime Sentencing Guideline ('Wildlife Guideline') and the Wildlife Crime Sentencing Calculator ('Sentencing Calculator') for the purpose of sentencing the accused.

Held (dismissing appeal; affirming sentence imposed by Sessions Court):

(1) The SCJ correctly referred to the relevant provisions of the law under the Ordinance. The accused was charged under s. 37(1) of the Ordinance, punishable under s. 37(2)(a) read together with s. 29(1)(c) of the Ordinance. Section 29(1)(c) provides that, in a case of other protected animals not mentioned in paras (a) or (b), the penalty is imprisonment term for two years and a fine of RM25,000. Where more than one penalty is provided under the Ordinance, the word 'and' does not mean that both penalties should be inflicted against the accused. (paras 26-28)

(2) The accused was sentenced by the SCJ to a fine of RM6,372 (equivalent to RM12 per egg), in default six months' imprisonment. The SCJ (i) did not err in imposing a fine only. The fine imposed was well within the penalty prescribed under s. 29(1)(c) as it did not exceed the maximum limit of RM25,000; (ii) had adequately taken into consideration relevant factors in support of the mitigating and aggravating factors; and (iii) had exercised his discretionary power within the ambit permissible under the law. The SCJ had not erred in law or in any manner whatsoever in the exercise of his discretion in imposing the appropriate sentence. The punishment meted out was just and fair and not manifestly inadequate, considering the whole circumstances of the case, and there was no evidence indicating that the accused was a repeated offender. (paras 29, 32 & 36)

(3) The Wildlife Guideline and the Sentencing Calculator served as non-binding tools intended to assist the SCJ. While they may provide useful guidance, they are not mandatory and did not fetter the court's discretion. Their use, or lack thereof, did not affect the validity or legality of the sentence imposed by the Sessions Court. (para 31)

Case(s) referred to:

Bhandulananda Jayatilake v. PP [1981] CLJU 139; [1981] 1 LNS 139 FC ***(refd)***
Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC ***(refd)***
Ooi Hun Seng v. PP [2021] 1 CLJ 413 HC ***(refd)***
PP v. Leonard Glenn Francis [1989] 1 CLJ 972; [1989] 2 CLJ (Rep) 320 HC ***(refd)***
PP v. Mohamed Nor & Ors [1985] CLJU 25; [1985] 1 LNS 25 SC ***(refd)***
PP v. Toh Tung Kit [2023] 1 CLJ 633 HC ***(refd)***
R v. Ball [1989] Crim LR 730 CA ***(refd)***
Zulkifli Ismail v. PP [1994] 4 CLJ 450 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173(b), 316, 325
Interpretation Ordinance, 2005 Chapter 61, ss. 44, 45
Wild Life Protection Ordinance, 1998 (Chapter 26), ss. 29(1)(c), 37(1), (2)(a), First Schedule

For the appellant - Ronald Felix; Sarawak State Attorney General's Chamber
For the respondent - Jong Yee Ling (YBGK assigned counsel); M/s Chew, Jugah, Wan Ullok & Co

Reported by Najib Tamby

JUDGMENT

Faridz Gohim Abdullah JC:

Introduction

[1] This criminal appeal, filed by the Public Prosecutor (Sarawak Forestry Corporation), challenges the inadequacy of the sentence imposed by the Honourable Sessions Court Judge ("the learned SCJ"), Tuan Musli bin Ab Hamid, on 18 September 2023, as stated in the notice of appeal filed on 23 April 2024.

[2] For ease of reference, the parties will be referred to as they were in the lower court: the Public Prosecutor as the prosecution, and Kamil bin Suteh as the accused.

[3] On 16 April 2025, I have decided on the appeal and dismissed the same accordingly. Dissatisfied with my decision, the prosecution had filed a notice of appeal to the Court of Appeal dated 24 April 2025.

[4] Below are the grounds of my decision.

Brief Background Facts

[5] In the present appeal, the accused was charged with possessing 531 marine turtle eggs (species *Cheloniidae*), which are classified as derivatives of a totally protected animal under s. 37(1) of the Wild Life Protection Ordinance, 1998 (Chapter 26). Upon pleading guilty, the accused was convicted and sentenced to a fine of RM6,372 (equivalent to RM12 per turtle egg), with a default sentence of six months' imprisonment. The fine was paid in full on the same day.

[6] The brief facts of this case can be found on pp. 11 to 12 of the record of appeal (ROA).

[7] For ease of reference, the said brief facts are reproduced as follows:

(i) on the 14 October 2023 at about 11.50 hours, a team led by Sarawak Forestry Corporation's enforcement officer Mr Joshua anak Nyawai had conducted a raid on a residential house No. 2, Kampung Telok Melano Sematan, 94500 Lundu, Kuching, Sarawak, which was suspected of selling marine turtle eggs;

(ii) during the raid, the team discovered a white polystyrene box in the backyard of the accused's house and a white transparent container in the kitchen containing eggs suspected to be marine turtle eggs;

(iii) further investigation revealed that the white polystyrene box contained 499 marine turtle eggs and the white transparent container contained 32 marine turtle eggs. The accused was in possession of a total of 531 turtle eggs and had failed to show that he had any valid permission in writing from the controller of wild life to have in possession such marine turtle eggs; and

(iv) the examination of the 531 turtle eggs by Biodiversity Conservation and Research Division of the Sarawak Forestry Corporation confirmed that the eggs are marine turtle eggs (species of *Cheloniidae*) all of which are species listed as totally protected animal in Part I of the First Schedule of the Wild Life Protection Ordinance, 1998 and in possession of such species without license or the permission in writing of the Controller of Wild Life is an offence under s. 37(1) of the Wild Life Protection Ordinance, 1998 and punishable under ss. 37(2)(a) and 29(1)(c) of the same Ordinance, and would, upon conviction, be punishable with imprisonment for two years and a fine of RM25,000 per individual animal part.

[8] The examination was conducted by one, Salvia Sembai anak Ettin, a Wildlife Officer (G44) of Fauna Research and Conservation (Marine) Section, Biodiversity Conservation and Research Division, Sarawak Forestry Corporation.

[9] The examination results state:

> The evidence consisted of 531 pieces fresh exhibit specimen basic morphological characteristic is eggs belong to marine turtle belong to (species of *Cheloniidae*) as verified by comparison with reference specimens in *"Encyclopedia of Turtles*" by Dr. Peter CH Pritchard (1979). The species is listed as Totally Protected Animal under the Wild Life Protection Ordinance, 1998 and listed as ENDANGERED in the International Union for Conservation of Nature's Red List of Threatened Species (lUCN Red List) and Appendix I of the Convention on International Trade in Endangered Species of Flora and Fauna (CITES) [page 29 ROA].

The Charge

[10] The charge preferred against the accused is as follows:

> That you, on the 14th of October 2023 at about 1150 hours at the residential house at No. 2, Kampung Telok Melano, Sematan in the District of Lundu, in Kuching Division in the State of Sarawak, have in your possession, to wit 531 pieces of marine turtle eggs (species *Cheloniidae*), all which are the derivatives of the Totally Protected Animal

under the Wild Life Protection Ordinance, 1998 (Chapter 26) without license issued under the same, and therefore, you have committed an offence under Section 37(1) of the Wild Life Protection Ordinance, 1998 [Chapter 26] and punishable under Section 37(2)(a) read together with section 29(1)(c) of the Wild Life Protection Ordinance, 1998 [Chapter 26].

The Relevant Law

[11] Section 37(1) of the Wild Life Protection Ordinance, 1998 (Chapter 26) states as follows:

37 (1) No person shall, unless licensed under this Ordinance, have in his possession any species of wild animal:

Provided that

(a) a native residing within a Native Area Land or Native Customary Land may have in his possession, for his own consumption or use, any wild animal or other recognizable part or derivative thereof; and

(b) any other person may have, for his own consumption, not more than five kilograms of wild animal.

[12] Section 37(2)(a) of the Wild Life Protection Ordinance, 1998 states as follows:

(2) Any person who contravenes subsection (1) shall be guilty of an offence: Penalty:

(a) if the animal concerned is a totally protected species, the penalty shall follow those specified in subsection (1) of section 29 per individual animal and animal part in his possession;

(b) if the animal concerned is a protected species, the penalty shall follow those specified in subsection (2) of section 29 per individual animal and animal part in his possession;

(c) for all other species, the penalty shall be imprisonment for one year and a fine of two thousand ringgit per individual animal and animal part found in his possession.

[13] Section 29(1)(c) of the Wild Life Protection Ordinance, 1998 states as follows:

29. (1) Any person who hunts, kills, captures, sells, offers for sale or claims to be offering for sale, imports, exports, or is in possession of, any totally protected animal or any recognizable part or derivative thereof, or any nest thereof, except in accordance with the permission in writing of the Controller for scientific or educational purposes or for the protection and conservation of such totally protected animal, shall be guilty of an offence: Penalty:

(a) if the animal concerned is a rhinoceros, imprisonment for five years and a fine of fifty thousand ringgit;

(b) if the animal concerned is an orang-utan or *proboscis* monkey, imprisonment for two years and a fine of thirty thousand ringgit;

A (c) in the case of other totally protected animals not mentioned in paragraph (a) or (b), imprisonment for two years and a fine of twenty-five thousand ringgit.

Grounds Of Appeal

B **[14]** The prosecution's grounds of appeal are as set out in the petition of appeal, which can be summarised as follows:

(i) the sentence imposed by the learned SCJ was inadequate; and

(ii) the learned SCJ did not view the whole of the evidence objectively and opted not to apply both the Sarawak's Wild Life Crime Sentencing C Guideline launched in June 2022 and Wild Life Crime Sentencing Calculator launched in April 2024.

Prosecution's Submission

[15] The prosecution submits that the learned SCJ had erred in viewing the D whole of the evidence objectively and opted not to apply both the Sarawak Wild Life Crime Sentencing Guideline launched in June 2022 and Wild Life Crime Sentencing Calculator launched in April 2024.

[16] It was submitted that the learned SCJ had disregarded the Wild Life Sentencing Guidelines for Sarawak as shown in the notes of proceedings. The E said sentencing guidelines, specifically the one launched in 2022, are there to assist judges in passing fair and consistent sentences which commensurate with the nature of wildlife crime and also help advance the implementation of the environmental court in Sarawak.

F **[17]** Reference was made by the prosecution to the Sibu High Court case of *PP v. Toh Tung Kit* [2023] 1 CLJ 633, where the court held that:

> [22] As the judiciary is the guardian of the rule of law this court is in the best position to give environmental law its full force and effect. Its decisions can ensure environmental responsibility and accountability. The decisions today will determine what is left of the environment for the G generations to come.

[18] In this connection, the prosecution contended that they had submitted before the SCJ that wildlife cases involving marine turtle eggs belonging to *Cheloniidae* species are growing rampant in Sarawak and that the illegal activity possesses a grave threat to the survival of the totally protected animal H species, pushing them closer to the brink of extinction.

[19] Further, the prosecution submits that upon reading those relevant statutory provisions, it is the intention of the legislature that penalty clauses provide custodial sentences to ensure the protection of the wildlife. A judicial sentence must be in accordance with the principle of law. I

[20] The prosecution also contends that this court may exercise its revisionary power under s. 325 of the CPC read with s. 316, to enhance the sentence of imprisonment imposed by the court below (cases of *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163; [1987] 2 MLJ 69 and *Zulkifli Ismail v. PP* [1994] 4 CLJ 450 are referred to).

Accused's Submission

[21] It is the accused's contention that the prosecution's appeal ought to be dismissed based on the following grounds:

(i) the sentence imposed by the learned SCJ was not inadequate as it is within the discretionary limits;

(ii) the sentence is passed according to the law as it falls within the ambit of s. 29(1)(c) read with s. 37(2)(a) of the Wild Life Protection Ordinance, 1998;

(iii) the learned SCJ had rightly considered the evidence before arriving at his decision and pronouncing the sentence;

(iv) the learned SCJ had rightly pointed out that the prosecution did not submit on the trend of sentencing for the consideration of the (trial) court;

(v) the accused's guilty plea and mitigation had been rightly considered by the learned SCJ in sentencing;

(vi) the prosecution did not elaborate on Wild Life Crime Sentencing Guideline launched in June 2022 and Wild Life Crime Sentencing Calculator launched in April 2024; and

(vii) the sentence ought not to be altered, disturbed or under revision pursuant to s. 325 of the CPC as there is no miscarriage of justice or irregularity of procedure (refer the case of *Ooi Hun Seng v. PP* [2021] 1 CLJ 413).

Issues To Be Determined

[22] The issue here is whether, considering the facts of the case presented before the learned SCJ, the sentence imposed on the accused is manifestly inadequate in the circumstances.

Findings Of The Court

[23] In passing a sentence, the court must take into account the mitigating and aggravating factors in order to ensure that the sentence passed is in accordance with the law. The common factors are as follows:

(i) an accused person who pleads guilty should generally be given credit or a discount on the term of imprisonment. The rationale is that the great expense of a lengthy trial is avoided. Witnesses are saved the

A inconvenience of a trial, and by early disposal, the court is relieved of the backlog of undisposed cases. If there is no discount given, accused persons would not be induced to plead guilty, as they would rather try their luck in a trial;

B (ii) in deciding the appropriate sentence, the first and foremost consideration is the public interest. The sentence imposed must strike the right balance between the public interest and the interests of the accused. In striking this balance, certain objectives of such sentence must be considered. Firstly, by punishing the offender, the aim is to reflect society's disapproval or even revulsion of the crime committed;

C (iii) Secondly, as stated in *R v. Ball* [1989] Crim LR 730, public interest is best served by deterring not only the offender from committing the crime again but also to deter others who may be similarly tempted to do so. It was also held that public interest is best served by inducing the offender to turn from criminal ways to honest living; and

D (iv) Section 173(b) of the Criminal Procedure Code ("CPC") (where the accused pleads guilty) and s. 173(m)(ii) (where the accused is found guilty) provide that the court shall pass sentence according to law. Passing a sentence according to law means the sentence imposed must not only be within the ambit of the sentence stipulated but also assessed E and passed according to established judicial principles.

[24] I have perused the record of appeal and the grounds of decision of the learned SCJ. It is an established principle of law that when dealing with an appeal against sentence, the appellate court should be slow to interfere or F disturb with a sentence passed by the court below unless it is manifestly wrong in the sense of being illegal or being unsuitable to the proved facts and circumstances.

[25] This court refers to the case of *PP v. Mohamed Nor & Ors* [1985] CLJU 25; [1985] 1 LNS 25; [1985] 2 MLJ 200, where the Supreme Court held:

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> It is an established principle that an appellate court should be slow to interfere or disturb with a sentence passed by the court below unless it is manifestly wrong in the sense of being illegal or being unsuitable to the proved facts and circumstances. And the mere fact that another court might pass a different sentence provides no reason for the appellate court H to interfere if the court below applies the correct principles in the assessment of the sentence.

[26] This court has considered the factors that were taken into account by the learned SCJ before he passed the sentence on the accused. Based on the totality of evidence and the grounds of decision of the learned SCJ, I am of I the considered view that the learned SCJ had correctly referred to the relevant provisions of the law under the Wild Life Protection Ordinance, 1998 (Chapter 26).

[27] The accused was charged under s. 37(1) of the Wild Life Protection Ordinance, 1998 punishable under s. 37(2)(a) read together with s. 29(1)(c) of the same Ordinance. Section 29(1)(c) provides that in a case of other protected animals not mentioned in para. (a) or (b), the penalty is imprisonment term for two years and a fine of RM25,000.

[28] It must be noted that in reading the prescribed offence where more than one penalty is provided under the Ordinance, the word "and" does not mean that both penalties should be inflicted against the accused. Section 44 read together with s. 45 of the Interpretation Ordinance, 2005 [Chapter 61] states as follows:

> Method of prescribing penalties and cumulative penalties
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> 44. Whenever in or by virtue of any written law more than one penalty is prescribed for an offence, the use of the word "and" shall signify that the penalties may be inflicted alternatively or cumulatively:
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> Provided that, without prejudice to the foregoing or to section 45, the use of the word "penalty" in a provision of any written law shall, if no offence is specified, be deemed to prescribe that a contravention of the provision in which the word appears is an offence punishable by penalties not exceeding those specified immediately after the word "penalty".
>
> Penalties prescribed to be maximum penalties
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> 45. Whenever in or by virtue of any written law a penalty, whether of fine or imprisonment, is prescribed for an offence the same shall imply:
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> (a) that that offence shall be punishable upon conviction by a penalty not exceeding the penalty prescribed; and
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> (b) if the amount of the fine is unspecified, that that offence shall, without prejudice to any provision of law against excessive and unreasonable fines and assessments, be punishable by a fine of any amount.

[29] In the present appeal, the accused was sentenced by the learned SCJ to a fine of RM6,372 (equivalent to RM12 per turtle egg), in default of six months' imprisonment. Applying the aforementioned legal principle, the learned SCJ did not err in imposing a fine only. In fact, the fine imposed is well within the penalty prescribed under s. 29(1)(c), as it does not exceed the maximum limit of RM25,000.

[30] This court has perused the grounds of decision by the learned SCJ in addressing the issue of the application of both Sarawak Wild Life Crime Sentencing Guideline launched in June 2022 and the Wild Life Crime Sentencing Calculator launched in April 2024 for the purpose of sentencing the accused.

[31] This court is of the view that the Wildlife Sentencing Guideline and Sentencing Calculator serve as non-binding tools intended to assist the learned SCJ. While they may provide useful guidance, they are not mandatory and do not fetter the court's discretion. Their use, or lack thereof, does not affect the validity or legality of the sentence imposed by the lower court.

[32] Therefore, this court is of the considered view that the learned SCJ has adequately taken into consideration the relevant factors in support of the mitigating and the aggravating factors. Guided by the Federal Court's case of *Bhandulananda Jayatilake v. PP* [1981] CLJU 139; [1981] 1 LNS 139, I am of the view that the learned SCJ had exercised his discretionary power within the ambit permissible under the law.

[33] In considering the deterrent sentence, the learned SCJ had considered the aggravating factor submitted by the prosecution that the "level of offence is high" and the "level of harm is high", which was not supported by any authorities. There was also no supporting evidence adduced by the prosecution that the offence of "possession of marine turtle eggs is rampant throughout Sarawak and Sabah".

[34] The following are the learned SCJ observations:

> EVALUATION OF THE LEARNED DEPUTY PUBLIC PROSECUTOR'S SUBMISSION IN THEIR PURSUIT FOR A DETERRENT SENTENCE AGAINST THE ACCUSED PERSON:
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> 15. The learned Deputy in her argument submitted that the Level of offence is high and the Level of harm is high. Surprisingly; there was no elaboration as to how she had come to these conclusions.
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> 16. This Court is of the view; for the learned Deputy to submit that the "level of offence is high" and the "level of harm is high", it must be supported either by any decided case laws, any related academic literatures, or any relevant data from the relevant agencies such as Sarawak Forestry Corporation, Sabah Wildlife Department and Department of Wildlife and National Parks Peninsular Malaysia. Unfortunately; none had been submitted to this Court during the proceeding.
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> 17. This Court is of the opinion that; in their pursuit for the deterrent sentence to be imposed against the accused person and to say that the "level of offence is high" and the "level of harm is high; the prosecution is duty bound to supply this Court with the relevant and reliable information to fortify their argument. A mere statement from the Bar without any basis cannot be accepted by this Court".

[35] The learned SCJ had also considered the trend of sentencing for offences of illegal possession of marine turtle eggs as per highlighted in para. 31 of his grounds of decision.

[36] In the premises, I agree with the reasoning relied on by the learned SCJ and have found that the punishment meted out is just and fair and not manifestly inadequate, considering the whole circumstances of the case and that no evidence indicated the accused is a repeated offender. I am of the view that the trial judge has not erred in law or in any manner whatsoever in the exercise of his discretion in imposing the appropriate sentence.

Conclusion

[37] In the often-cited case of *PP v. Leonard Glenn Francis* [1989] 1 CLJ 972; [1989] 2 CLJ (Rep) 320; [1989] 2 MLJ 158, the court ruled as follows:

> Now, the principles which an appellate Court must observe in an appeal against sentence are these:
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> (1) the Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial judge had seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that the Court will alter it.

[38] Given the above, this court finds no justifiable basis to interfere with the sentence imposed by the learned SCJ. There is no indication that the learned SCJ erred in applying the correct sentencing principles or had embarked on some unauthorised or extraneous exercise of discretion.

[39] As such, the appeal is dismissed accordingly. The learned SCJ sentence of a fine of RM6,372 in default six months imprisonment is affirmed.